

SERVED: March 30, 1994

NTSB Order No. EA-4133

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 25th day of March, 1994

DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-13301
v.	)	
	)	
JERRY LYNN KLUTTS,	)	
	)	
Respondent.	)	
	)	

**ORDER DISMISSING APPEAL**

Respondent, by counsel J. Phelps Jones, on January 28, 1994, filed a motion for late filing, requesting that he be granted an extension of time to file an appeal brief that was already out of time. The brief was due for filing on January 26, 50 days after the law judge rendered an oral initial decision<sup>1</sup> in the emergency proceeding held on December 7, 1993. See Section 821.48(a) of the Board's Rules of Practice, 49 CFR 821.<sup>2</sup> Mr. Jones had been

<sup>1</sup>The law judge affirmed the emergency order of the Administrator revoking respondent's Inspection Authorization Number 455728420 for alleged violations of Sections 43.9(a)(3) and (4), 43.13(a) and (b), and 43.15(a)(1) of the Federal Aviation Regulations. The respondent had waived expedited processing of the case as an emergency.

<sup>2</sup>Section 821.48(a) provides as follows:

§ 821.48 Briefs and oral argument.

(a) Appeal briefs. Each appeal must be perfected

advised during the morning of January 28 that such a motion was necessary because an extension of time (until February 4) to file the brief granted by the Board's General Counsel in the late afternoon of January 27 was not valid, as it was based on the mistaken belief (per the representation of counsel) that the time for filing the brief had not run out.<sup>3</sup>

In his motion, Mr. Jones states, without elaboration, both that on January 10 a secretary responsible for docketing all cases had left his employment after 3 years and that during a week following her departure he had to familiarize a new secretary while he was ill. To the extent that counsel is suggesting that he has good cause for the late extension request because his secretary may have miscalculated the due date for the brief when docketing the case, the suggestion is unavailing. The Board has held, as the Administrator correctly notes in a motion to dismiss filed in response to respondent's motion, that counsel is responsible for the actions of his staff. See Administrator v. Robinson, NTSB Order No. EA-3496 (1992) and Administrator v. Knowles and Slay, Order Denying Reconsideration, NTSB Order EA-4001 (1993) (Counsel's responsibility to ensure that client's brief is filed on time is not altered by delegation of the nonministerial task of computing the filing deadline to a subordinate). Nor does the Board accept miscalculation as establishing good cause to excuse the failure to meet a filing deadline. See, e.g. Administrator v. Beavers, NTSB Order EA-3359 (1991). To the extent counsel seeks to establish that the untimeliness of the appeal brief is somehow excusable for some unidentified medical problem that lasted a week following the (...continued)

within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

<sup>3</sup>This advice was delivered first by a paralegal specialist in the General Counsel's Office. When Mr. Jones questioned her assessment of the matter, threatening that he would have to "call the White House," he was referred to the Board's Associate General Counsel, who confirmed the paralegal specialist's determination that the brief had been due two days earlier, on January 26, not the 27th, that the previously granted extension was of no effect, and that the tardy brief could be accepted by the Board only on a motion demonstrating good cause for the untimeliness. Mr. Jones was further advised, pursuant to his request, that clerical and medical circumstances had supported good cause findings in a very few prior cases.

loss of his longtime employee, we note that the appeal brief was not due for more than two weeks after the 10th of January. Moreover, if Mr. Jones were able to train a new secretary while sick, he presumably would have been well enough to request, either personally or through the new employee, more time to file the appeal brief before the time for doing so expired.

Notwithstanding Mr. Jones' earlier concession that the date for filing the brief had been "inaccurately calendared," he asserts in response to the motion to dismiss that he contacted the Board's General Counsel on January 26 for an extension to file the appeal brief and appears to contend, illogically, that good cause exists for accepting the brief filed on January 28 because he detrimentally relied on the extension the General Counsel had granted "by ceasing his efforts to obtain a continuance." There would have been no reason for Mr. Jones to pursue a continuance if he had received an extension on the 26th, and the General Counsel's staff would have had no occasion later to call him concerning the extension. In any event, as noted, *supra*, the contact with the General Counsel was on the 27th, when the brief was already late, and the error in granting an extension on that date was corrected early the next day. The suggestion of any adverse impact based on the actual facts is frivolous.

Because good cause has not been established in respondent's motion for late filing or in his response to the motion to dismiss, his noncompliance with the time limit for filing an appeal brief is not excused and his appeal must be dismissed. See Administrator v. Hooper, NTSB Order No. EA-2781 (1988).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's motion for late filing is denied;
2. The Administrator's motion to dismiss is granted; and
3. The respondent's appeal is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above order.